IN THE

Supreme Court of the United States

October Term, 1973

No._____

EDWARD W. GREENBANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

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ABBREVIATIONS

For purposes of this petition the Reporter's Transcript will be designated as "RT" followed by the appropriate page number.

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Edward W. Greenbank ("Greenbank") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, entered 28 January 1974.

OPINIONS BELOW

The ruling of the District Court granting Greenbank's motion for judgment of acquittal on Count II, Possession with Intent to Distribute a Controlled Substance, Title 21 U.S.C. § 841(a)(1) and (b) and the denial of the motion as to Count I, Conspiracy to Commit an Offense against the United States, Title 21 U.S.C. § 846 is attached hereto as Appendix A, pages A-1 - A-6. The opinion of the Court of Appeals for the Ninth Circuit has not yet been reported and is attached hereto as Appendix B, pages A-7 - A-21. The order denying Greenbank's motion for rehearing in the Court of Appeals is attached hereto as Appendix C, page A-22.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered 28 January 1974. Greenbank's motion for

re-hearing was denied 28 February 1974. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the acts of a government informant in arranging for the sale of marijuana, negotiating for the purchase of marijuana from a Mexican smuggler, assisting in the smuggling of the marijuana from Mexico into the United States, transporting and delivering the marijuana and returning to the United States-Mexico border with the knowledge of United States Customs officials, to pay the Mexican smuggler for the contraband, is a case in which the "conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 430 (1973).

CONSTITUTIONAL PROVISIONS INVOLVED.

AMENDMENT 5 OF THE UNITED STATES CONSTITUTION

"No person shall . . ., be deprived of life, liberty, or property without due process of law."

STATEMENT OF FACTS

Sometime during the last week of June 1972, Francisco Jose Gonzalez, a paid government informant-agent, was in contact with two Mexican marijuana smugglers named Conde and Duarte. They had contacted Gonzalez and requested that he drive a car for them containing a load of marijuana (RT 335). Gonzalez contacted Agent Washington of the United States Customs office in San Luis, Arizona, and informed him of the identity of the Mexican smugglers and their requests (RT 295-296). Agent Washington told Gonzalez to contact him later for further instructions. Washington promised Gonzalez that he, Gonzalez, would be

paid for his work. The following day, Gonzalez and Conde drove to an Indian reservation near Ajo, Arizona (RT 335). On the reservation, Conde showed Gonzalez where the marijuana was going to come through the United States-Mexican border (RT 337). Conde explained that Gonzalez was to pick it up and drive it out. This information was transmitted by Gonzalez to Agent Washington.

From the reservation, Conde and Gonzalez drove to the residence of Richard Gill, the intended buyer of the marijuana (RT 342). Over the next few days both Conde and Gill used the informant, Gonzalez, as an intermediary to negotiate details of the transaction (RT 348).

Apparently Gill's out of state buyers had not raised the funds to buy all the marijuana. It appeared that the transaction might be ended at that point. This information was relayed to Gonzalez. Gill

also requested that some of the marijuana be given to him, Gill, on credit (RT 348). It was informant Gonzalez who told Gill that Conde would not agree to provide him the marijuana on credit. Gonzalez then urged Gill to call Conde in order to arrange a credit transaction.

On the morning of the planned pickup, Gonzalez phoned Agent Washington to tell him of the plans and Washington again told Gonzalez to go ahead. Gonzalez drove to Gila Bend, Arizona, to meet Gill at the Space Age Lodge restaurant. There the two men discussed the proposed marijuana transaction (RT 288). Greenbank was present when Gonzalez first arrived. This was the first occasion at which Gonzalez met Greenbank (RT 356, 357). Greenbank waited outside the restaurant while the above mentioned conversation took place (RT 358, 359). Later Gonzalez left Gila Bend enroute to the United States-Mexico border to pick up

the marijuana. While driving to the pick-up site, Gonzalez met Agent Seaver on the highway near Why, Arizona. There, the two men discussed their plans and finally Gonzalez said that since he was there already, he might as well go through with the deal (RT 206).

Gonzalez drove to the reservation and met with Conde (RT 297). Gonzalez then loaded the marijuana into the car that he was driving. Shortly after leaving the reservation, Gonzalez spotted Agent Seaver's truck, stopped his car, and showed Seaver and Customs officials the marijuana in the trunk (RT 212, 214). He also informed the government agents where Conde, Duarte and the rest of the marijuana could be located. After this meeting, Gonzalez drove off followed by Agent Seaver, both headed to Gila Bend, Arizona.

Car trouble forced Gonzalez to leave the car with the marijuana at a service

station and from there he was given a ride by Agent Seaver to the hotel where Greenbank was staying (RT 216). After a delay, Gonzalez was given $9,000.00 for the marijuana, left the hotel and again met the government agents at a service station (RT 181). There he gave the agents a description of Greenbank and his car, and reported to the agents he had been paid the $9,000.00 for the marijuana. Shortly thereafter, Greenbank and other defendants were arrested. At some later time, Gonzalez went to Yuma, Arizona and paid Conde, the Mexican smuggler, his money.

Greenbank was indicted in one count for Possession with Intent to Distribute a Controlled Substance; a violation of Title 21 U.S.C. § 841(a)(1) and (b). In another count, Greenbank was accused of Conspiracy to Commit an Offense Against the United States in violation of Title 21 U.S.C. § 846. Greenbank requested that the

informant be made available for an interview.

Examination of the informant revealed his immersion in criminal activities ranging from importation of marijuana from Mexico into the United States to transportation of marijuana. These illegal activities were confirmed in cross examination of Agent Seaver by counsel for Greenbank when the agent testified as follows:

> Q. Your agent bought, paid for, sold and assisted in the smuggling of the marijuana that these two people are charged with today, didn't he?
>
> A. --
>
> Q. Didn't he?
>
> A. Yes sir.
>
> Q. Okay. He also got paid by you for setting them up, didn't he?
>
> A. He received a reward, yes sir.
>
> (RT page 217, lines 12-20).

The jury returned a verdict of guilty

on both counts. The trial court granted Greenbank's motion for judgment of acquittal on the count charging Possession with Intent to Distribute. The Court would not disturb the verdict on the count charging Conspiracy. On appeal, the Court of Appeals for the Ninth Circuit affirmed the judgment of conviction.

REASONS FOR GRANTING THE WRIT

In *United States v. Russell*, 411 U.S. 423 (1973), this Court found that the facts did not justify the legal conclusion reached by the Ninth Circuit Court of Appeals. That Court held that as a matter of law "a defense to a criminal charge may be founded upon an intolerable degree of government participation in the criminal enterprise". *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972). In so holding, this Court reaffirmed its prior decisions in *Sorrells v. United States*, 287 U.S. 435 (1932), and

Sherman v. United States, 356 U.S. 369 (1958) that the basis of the statutory entrapment defense has its focus on the predisposition of the defendant rather than the degree of governmental involvement in the criminal enterprise.

Greenbank readily concedes that this Court's ruling in *Russell*, *supra*, forecloses recourse to the traditional entrapment defense. While recognizing this concession by Greenbank, the Court of Appeals misconstrued Greenbank's defense as being based upon the broadened view of *Sorrells*, *supra*, and *Sherman*, *supra*. This is simply not the case. Greenbank's defense is premised upon due process grounds rather than the traditional entrapment defense or broadened view of said defense, *i.e.*, the degree of governmental involvement.

The possibility of a defense premised on due process was explicitly left open by this Court's holding in *Russell*, *supra*,

where it was stated

> "While we may someday be presented with a situation in which conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction [citation omitted], the instant case is distinctly not of that breed." 411 U.S. at 431, 432.

The facts of the instant case are of that breed. Invocation of the judicial process to obtain a conviction, here, violated fundamental notions of due process.

In *Russell*, this Court was asked to elevate the defense of entrapment to constitutional stature by analogy to the factors that led to application of the exclusionary rule to illegal searches and seizures. This argument was rejected in the following language.

> "The analogy is imperfect in any event, for the principal reason behind the adoption of the exclusionary rule was the government's failure to observe its own laws. Mapp v. Ohio, supra, 367 U.S. at 659. Unlike the situations giving rise to the holdings in Mapp

> and Miranda, the government's conduct here violated no independent constitutional right of the respondent. Nor did Shapiro violate any federal statute or rule or commit any crime in infiltrating the respondent's drug enterprise." *United States v. Russell, supra,* 411 U.S. at 430.

The government in the instant case has repeatedly broken its own laws. This lawlessness began when a government agent helped in smuggling an illegal substance from Mexico into the United States. A violation of Title 21 U.S.C. § 952(a) (Importation of Controlled Substance). The government agent was instrumental in negotiating the purchase of the marijuana from the Mexican smuggler. He assisted in the transportation of the marijuana by picking it up at a pre-arranged site. He delivered the marijuana and received $9,000.00 for the delivery. Then, with the knowledge and consent of United States Customs officials, returned to the United States-Mexico border and payed the Mexican smuggler. Clearly

the government in the instant case is guilty of "failure to observe its own laws." *Mapp v. Ohio, supra,* 367 U.S. at 659.

This distinction becomes more cogent when viewed against recent cases that have applied this Court's holding in *Russell, supra.* There has been a uniformity of result against the defendants on the issue of entrapment because the government has merely provided an opportunity for the defendant to commit a crime. *United States v. Dodson,* 481 F.2d 656 (5th Cir. 1973); *United States v. Martin,* 482 F.2d 202 (9th Cir. 1973); *United States v. Croxton,* 482 F.2d 231 (9th Cir. 1973); *United States v. Ambrose,* 483 F.2d 742 (6th Cir. 1973); *United States v. Pollard,* 483 F.2d 929 (8th Cir. 1973) and *United States v. Ewbank,* 483 F.2d 1149 (9th Cir. 1973). In the case at bar, the government provided more than mere opportunity. The government was instrumental in procuring the corpus delecti

of the crime, the contraband.

In *Russell, supra*, the Court noted that the chemical supplied by the agent was a harmless substance and its possession was legal. The defendant admitted making the drug both before and after the government agent supplied the chemical to them. In the instant case, the facts are markedly different. What was supplied by the government was an illegal substance. No transaction could have occurred before or after the appearance of the government agent since it was the agent who assisted Greenbank and the other defendants. All the acts hinge upon one factor, the activity of the government in creating the crime.

Finally, the Petitioner in *Russell, supra*, was engaged in an on-going criminal activity prior to the appearance of the government agent. In the case at bar, the government agent joined the criminal

enterprise at its inception. The criminal activity began when the source of the contraband, Conde, met with the government's agent-informant, Gonzalez. The next few days only Conde and Gonzalez met or talked by phone in order to arrange the time and place of delivery (RT 335, 342, 347-48). Defendant Gill then requested informant-agent Gonzalez to arrange for delivery of a different quantity of the contraband than originally planned. Furthermore, the entire enterprise could have terminated when Gill could not raise all the money and sought to have some of the contraband given to him on credit. It was Gonzalez, the government's agent-informant who told Gill that Conde would not do that. It was Gonzalez who urged Gill to call Conde in order to keep the criminal enterprise going to fruition. Every element of this criminal conspiracy had been effected except delivery of the contraband before

Greenbank appeared on the scene (RT 356, 357).

In its opinion, the Court of Appeals placed Conde, Gill and Greenbank as active participants in the enterprise prior to Gonzalez joining them. This characterization completely ignores the record in the case. The error is compounded by the Court's opinion that had not Gonzalez been the carrier, others could have been found for the job. The Court's reading of the record is clearly contradicted by the agent-informant himself when he testified as follows:

> Q. At some time later, you agreed to do it, did you not?
>
> A. I couldn't find anybody else who would do it. (RT page 341)

Since this Court did not expressly disavow the holdings in *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971); *United States v. Green*, 454 F.2d 783 (9th Cir. 1971) and *United States v. Chisum*, 312 F. Supp. 1307 (CD Cal. 1970) the rationale underlying

these decisions merits serious consideration. In essence these cases recognize that in ferreting out crime, the police must use some stealth and covert practices. At some point stealth becomes a violation of due process of law. The government can not create a crime and then punish the product of its creation, for such activity is beyond the pale of affording mere opportunity. Or as Justice Brandeis so succinctly phrased the proposition of law involved in the instant case.

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the

> law the end justifies the means--to declare that the Government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

JORDAN GREEN

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March, 1974

THE COURT: Very Well.

Thank you, ladies and gentlemen, for your services as jurors. You are excused from further attendance upon the court until notified.

(Whereupon, the jury left the courtroom.)

THE COURT: The defendants are on bail, are they?

MR. GREEN: Yes, your Honor. The defendant Greenbank has been released on his own recognizance.

THE COURT: I see. And the defendant Laakman is on bail?

MR. PEARLSTEIN: On his own recognizance.

THE COURT: Yes.

MR. LEGOWITZ: If it please the court, there is one matter that has not as yet

been adjudicated in this case.

At the close of the government's evidence, the defendants entered a motion for a directed verdict of acquittal which the court has taken under advisement.

THE COURT: Yes.

MR. LEBOWITZ: And the government would at this time request for the sake of a complete record if the court could perhaps make a determination of that motion at this time.

THE COURT: I will grant the motion as to Count II of the indictment as to Edward W. Greenbank.

MR. LEBOWITZ: Thank you.

For the records, Your Honor, so far as the government in this case is concerned, the government would request that in view of the jury's verdict, that the defendant's bond be revoked. We do this for the record as a matter of formality.

THE COURT: How soon can I get a

probation report?

MR. LEBOWITZ: I don't know how long it takes for a pre-sentence report. That's something I think only the probation department could answer, your Honor.

MR. GREEN: Our experience, you Honor, has been something more than two weeks.

MR. LEBOWITZ: And sometimes less than 30 days.

THE COURT: Well, I prefer myself to impose sentence when I've tried the case.

MR. LEBOWITZ: I understand. I believe the court could probably make a special request of the probation department to have it completed by a certain date, and if that is feasible, they are under the court's authority.

THE COURT: Yes. Well, will you convey my request to the probation department?

MR. LEBOWITZ: Is there a particular date that the court has in mind?

THE COURT: Well, I'll be leaving here

on the 3rd of May, so some time on or before the 3rd of May, I ought to have the report, and as soon as I get the report----

The defendants will be available at short notice, will they?

MR. GREEN: My client, Mr. Greenbank, will be available within 24 hours notice.

THE COURT: And will Mr. Laakman be available on immediate notice?

MR. PEARLSTEIN: Yes.

THE COURT: So ask them to get the report to me some time before the 3rd of May so we can notify the defendants and get them in here so that I can impose sentence.

MR. LEBOWITZ: I presume judgment is entered on the verdict with the----

THE COURT: Well, judgment isn't entered until they're sentenced.

MR. GREEN: If it please the court.

THE COURT: Yes.

MR. GREEN: With respect to the

defendant Greenbank, we again re-urge the motion made at the close of the government's case, a motion for a directed verdict, and the motion made at the close of all the evidence for a directed verdict on behalf of the defendant Greenbank with respect to Count III of the indictment.

THE COURT: Do I have any other motions before me in this?

MR. LEBOWITZ: Not that I know of, your Honor.

MR. PEARLSTEIN: Your Honor, I understand that all motions, especially the motion for a directed verdict at the close of the government's case, were re-urged at the close of the defendant's case.

THE COURT: Yes. I so understand that they're all before me.

And I'll deny all those motions as of now----

MR. LEBOWITZ: Very well, your Honor.

THE COURT: --- except the one I

granted with reference to Count II in connection with Mr. Greenbank.

MR. LEBOWITZ: Your Honor, I will contact the probation department. Meanwhile, I suggest that in order to facilitate this, the defendants report there today so that they can commence their report.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	FILED Jan 28 1974
v.	)	No. 73-2503
EDWARD W. GREENBANK, Defendant-Appellant.	)	OPINION

Appeal from the United States District Court for the District of Arizona

Before: WRIGHT and CHOY, Circuit Judges, and EAST, Senior District Judge*

EAST, Senior District Judge:

The defendant-appellant, Edward W. Greenbank (Greenbank), William T. Laakman and Betty Rose Laakman (the Laakmans) were indicted on one count of violating 21 U.S.C.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

§841(a)(1) and (b) [possession with intent to distribute a quantity of a controlled substance] and on one count of violating 21 U.S.C. §846 [conspiracy].

Greenbank and the Laakmans were jointly tried before a jury on April 17 through 19, 1973, and Greenbank was found guilty on both counts as charged. The district court had Greenbank's motion for judgment of acquittal for both counts under advisement, and thereupon granted the motion as to the possession count and entered appropriate order. Greenbank was sentenced to custody on the conspiracy conviction and appeals. We affirm.

Greenbank's assignments of error are consolidated as follows:

1. The District court should have granted defendant's motion for a verdict of acquittal on the conspiracy charge because of the total enmeshment, from beginning to end, of a paid government agent in

the criminal enterprise culminating in a denial of due process under the United States Constitution.

2. The cumulative effect of the numerous instances of prosecutorial misconduct throughout the trial constituted plain error and a new trial should have been granted, notwithstanding the fact that defense counsel withdrew his motion for a mistrial prior to closing argument.

3. The sentence imposed by the district court judge was invalid in that it was based on an erroneous and misleading presentence report.

Assignment of Error 1:

Greenbank candidly concedes in his briefs that the rationale and holding of United States v. Russell, 411 U.S. 423 (April 24, 1973) (Russell-Supreme Court), forecloses any defense of entrapment under the facts of this case. In fact, Greenbank states "he never asserted entrapment as a

defense." Yet it is fair to note that the jury trial was had during the advent of Russell-Supreme Court and while the rationale and holding of United States v. Russell, 459 F.2d 671 (9th Cir. 1972) (Russell-Circuit Court), was viable. It is manifest from the district court's jury instruction requested by Greenbank and objected to by the government that Greenbank's theory of defense throughout the trial and submission to the jury was based upon the broadened Sorrells v. United States, 287 U.S. 435, and Sherman v. United States, 356 U.S. 369, principle of the defense of entrapment as enunciated in Russell-Circuit Court, supra, viz:

> "that a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise."

That view or concept makes the essential element of the defense turn on a measuring or calibration of the type and

degree of governmental involvement in the criminal venture, rather than absence on the part of the accused a predisposition to commit the crime. It was that very concept that was flatly rejected in Russell-Supreme Court. Furthermore, that authority announced "the defense is not of a constitutional dimension" and dropped "the matter where it was left by the Court in Sherman:

> 'The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."' Id., at 372, quoting Sorrells v. United States, 287 U.S., at 442" at 434 and 435.
>
> "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of

entrapment comes into play" at 436.

It follows then that Greenbank's position on appeal levels with the principle contention urged in Russell-Supreme Court, at 431 and 432, namely" "the level of [the government's agent] involvement in the [enterprise] was so high that a criminal prosecution for the [illegal drug traffic] violates the fundamental principles of due process," and he seeks shelter in the Court's observation, "[w]hile we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 (1952)."

It appears in the evidentiary record that:

One Gonzalez was a known trafficker in illegal drugs with an arrest record. He had turned informer to the government and

received periodic compensation for his services;

Gonzalez had met on several occasions with parties to the enterprise, learned of a proposed $10,000 marijuana transaction and contacted an agent of the United States Customs Service;

Gonzalez infiltrated the enterprise, gave time-to-time progress reports to agents and participated therein to the extent of acting as a carrier of the contraband and money involved; however, he played no part in finding or producing the source or a purchaser of the contraband; and

Greenbank, a Gill and a Conde were active in the enterprise before Gonzalez appeared on the scene and became active, and had not Gonzalez played the role of a carrier other persons were available for that purpose.

Gonzalez was not as Greenbank contends a governmental generated vortex which

pulled an innocent into an illegal enterprise, rather he was a small disloyal cog turning within the illegal venture under the power of the predisposed mind and free hands of Greenbank and his co-conspirators. We are satisfied, as was the jury, that Greenbank "was not an unwary innocent' but, indeed, "an unwary criminal."

> "Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of apprehension; if that be so, then the [performance of a service which] the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate 'fundamental fairness' or 'shocking to the universal sense of justice,' Kinsella, supra." Russell-Supreme Court, at 432.

We conclude that no expressed or implied concept of federal due process was

violated by the government in making use of the evidentiary fruits obtained through Gonzalez's government countenanced infiltration and limited participation in the ongoing illegal enterprise. The assignment of error is without merit.

Assignment of Error 2:

The prosecutorial misconduct complained of can be broken down into three areas:

a. The display of a hand gun by a government witness and the government attorney in full view of the jury, and testimony of a government witness regarding the same weapon which was exhibited in a photographic exhibit.

b. The prejudical prosecutor's statement during trial of "fear for [Gonzalez's] life," and

c. Prejudical statements during closing argument of the prosecutor in praise of Gonzalez.

Area a: The gun and photograph proved to be utterly immaterial to the charges and were refused admission in evidence. The courtroom appearance and use of the articles were the subjects of a defense motion for a mistrial. However, before a ruling thereon defense counsel advised the district court,

> "I'm in a most difficult situation. I feel compelled to withdraw the motion for mistrial for the reason that the jury which we have, the complexion of the case at the present time, I think is as beneficial to my client as I could ever have it.
>
> "However, I don't think, although there are cases on mistrials, and not being able to refile the case and try it again, I don't think this case is at this time in that complexion. So I have consulted with co-counsel. I have consulted with my knowledgeable law clerk, and I would ask the clerk if I may withdraw my motion for mistrial, much as I would---"
>
> "THE COURT: Very well. The motion for mistrial is withdrawn.
>
> "Now when it comes time to instruct the jury, do you want me to make any reference to it, and

to tell them the gun has nothing to do with the case, and that they are to disregard it entirely?"

Area b: The prosecutor's statement of "fear for his life" entered the record during cross-examination of government witness Gonzalez as follows:

"Q. Okay. And where are you staying here while you're here?"

"[PROSECUTOR:] Objection, your Honor. This man is an informant."

"Q. Are you staying with Mr. Seaver? [Customs Service Agent.]"

"[PROSECUTOR:] There is possible fear for his life."

"[COUNSEL:] I'll withdraw it."

"[PROSECUTOR:] I am going to object."

"THE COURT: Sit down. Sustained."

"[COUNSEL:] I move for a mistrial on the comments of the prosecutor, your Honor.

"Your Honor, I'll withdraw the motion for mistrial. I don't want to go through that."

"THE COURT: Very well, proceed."

Greenbank concedes that the voluntary

withdrawal of the motions for mistrial forecloses him of an appealable order for assigned error. However, he would fault the district judge for plain error in non sua sponte declaring a mistrial on the very grounds he had expressly abandoned during trial. We understand the reasons for hindsight judgments, but scorn such double dealing on the district court.

Area c: The tenor of some of the statements of the prosecutor during closing argument are challenged as being of high prejudicial scale. It is fair to say that in the course of the argument Gonzalez was applauded for his prior service to law enforcement officers, his effectiveness as an informer was complimented and his help in controlling drug traffic was commended. However, we are mindful that closing argument was a reply to defense counsel's argument wherein Gonzalez was bitterly characterized as "a rat." As most trial lawyers

know, advocacy is not bound to wearing kid gloves or pulling punches.

We are content to state that the relevant evidence in the record was sufficient to support the inferences respective counsel in advocacy urged the jury to accept.

Greenbank also complains in his reply brief about the following closing argument comment:

> "All you're concerned with is whether the people here are guilty or not guilty, because counsel knows if we went into other facts concerning the activities of Gill and Conde, it would be outside the record and it would be objectionable, so we're not going to tell you all the things we know about them because we can't."

Whether this reference was based upon the prosecutor's personal knowledge apart from evidence in the record as dealt with in Orebo v. United States, 293 F.2d 747 9th Cir. 1961), is beside the point. Manifestly, the reference is not as to probable guilt of Greenbank as it deals with conduct

of Gill and Conde and not Greenbank.

We conclude that while the challenged prosecutor's statements, tactics and conduct are seemingly unexplainable, they in compounded effect do fall short of a bane of a fair trial for Greenbank. See Todorow v. United States, 173 F.2d 439 (9th Cir. 1949); cf. United States v. Cumberland, 200 F.2d 609 (3rd Cir. 1952), and Kotteakos v. United States, 328 U.S. 750 (1946).

To fault a district court for record plain error on an issue of law is one thing, but to fault on undisclosed and vague possible prejudicial jury exposure to irrelevant evidence and counsel's statements is quite another. The district court has wide discretion from his ringside observation to act and conduct an orderly fair trial for an accused. We note from the record timely and direct judicious warnings and admonitions to the jury following each of the incidents. We determine from our per-

usal of the record that there is an abundance of evidence of Greenbank's guilt and no substantial right of Greenbank was adversely affected as challenged and urged in assignment of error 2. The record is free of plain error.

Assignment of Error 3:

The record discloses that defense counsel examined the presentence report and made independent inquiry of sources. The district court heard counsel's objections to and explanation of reported material. The record is devoid of any fact which was not relevant in the determining of the discretionary and lawful sentence entered. The assignment is without merit.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	FILED
	)	Feb 28 1974
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
EDWARD W. GREENBANK,	)	No. 73-2503
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court for the District of Arizona

Before: WRIGHT and CHOY, Circuit Judges, and EAST, Senior District Judge*

O R D E R

The defendant-appellant's petition for rehearing is denied.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

The undersigned, a Notary Public in and for the County of Maricopa, State of Arizona, hereby states that he hand-delivered three (3) copies of the foregoing Petition for Writ of Certiorari to:

William C. Smitherman, Esq.
UNITED STATES ATTORNEY FOR
THE DISTRICT OF ARIZONA
Room 5000
230 N. 1st Ave.
Phoenix, Arizona 85025

and three (3) copies were placed in the United States Post Office at Phoenix, Arizona with Air Mail Postage fully prepaid and duly addressed as follows:

The Hon. Robert Bork
U. S. Solicitor General
Department of Justice
10th and Constitution Ave., N.W.
Washington, D.C. 20530

The above-mentioned service being accomplished on the 26th day of March, 1974.

/s/ William H. Howard
Notary Public

My commission expires: [SEAL]

May 28, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1439

EDWARD W. GREENBANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the actions of the government informer established entrapment as a matter of law.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of having conspired to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App.).

The evidence showed that one Gonzalez, a reputed trafficker in illegal drugs, had agreed to serve as an informer and that he received periodic compensation for his services. In June 1972, Gonzalez was approached by one Conde, a prior associate in the illegal drug traffic, who asked Gonzalez to drive a load of marijuana for him (Tr. 330-342).[1] He showed Gonzalez the place where

[1] "Tr." designates the reporter's transcript of the trial proceedings.

the drugs would be brought across the border, and Gonzalez relayed this information to the United States Customs Service (Tr. 294-296, 335-337). Conde subsequently introduced the informant to one Richard Gill, the buyer for the contraband (Tr. 321-322, 342). From this point on, Gonzalez acted as intermediary for the transaction (Tr. 348). Gill introduced Gonzalez to petitioner and he told Gonzalez that petitioner was his partner and had an equal share in the purchase. Petitioner assisted in arranging the details for the sale of $10,000 in smuggled marijuana (Tr. 288-290).

On the day of the sale, Gonzalez drove a 1968 Buick furnished by petitioner to the previously indicated location near the border, where Conde and others loaded the contraband in the trunk of the car (Tr. 292, 297-301, 353-354). Upon leaving the border, Gonzalez met with waiting federal agents, showed them the marijuana, and told them where Conde and the other Mexican smugglers were hiding with additional marijuana (Tr. 165-166, 212-214). Under surveillance, Gonzalez then proceeded to a motel in the town of Gila Bend, where he was to receive the payment and leave the car (Tr. 168-170). Part of the money was paid immediately, and, following a telephone call to Richard Gill, petitioner delivered the balance (Tr. 173-176, 309-315). Petitioner was observed shortly thereafter in the company of other parties to the venture, who were riding in the 1968 Buick (Tr. 184-188).

Petitioner testified in his own behalf and admitted that he assisted in the transaction knowing at the time that it was illegal (Tr. 420-424, 432-434). He also admitted discussing the possibility of future illegal drug ventures with Gonzalez (Tr. 435, 463).

Petitioner's sole contention is that the actions of the informer established entrapment as a matter of law because the government failed to observe its own laws (Pet. 14). Despite petitioner's disavowal, this is precisely the issue urged and rejected in *United States* v. *Russell,* 411 U.S. 423. In *Russell,* the majority reaffirmed the holding of *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman* v. *United States,* 356 U.S. 369, that the statutory defense of entrapment has as its basis the disinclination of the defendant to engage in criminal activity; the Court rejected the notion that a "defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise" (411 U.S. at 424).

However, relying on dictum in *Russell* that the Court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" (411 U.S. at 431-432), petitioner seeks to establish such outrageous conduct here. This argument is without substance.

Contrary to petitioner's claim, the venture was not initiated by the informer, nor was the contraband supplied by him. Conde, who supplied the contraband, was engaged in the continuing business of smuggling marijuana and knew that Gill was interested in purchasing some of it prior to Gonzalez's association with the conspiracy. While Gonzalez acted as intermediary, his role in this criminal enterprise was certainly no greater than that of the special agent in *Russell,* who not only supplied an essential ingredient for production of the drugs but also purchased most of the drugs produced. Moreover, Gonzalez was not a government employee but

acted on an *ad hoc* basis, supplying such information as he chose to federal authorities. Moreover, the record is devoid of any indication whatsoever that Gonzalez ever said or did anything personally to induce petitioner to join the conspiracy. Petitioner was first introduced to Gonzalez as a willing participant and half owner in the venture; whatever motivated petitioner to join the conspiracy, it would not have originated with Gonzalez. In addition, petitioner admitted discussing further illegal transactions in drugs after the completion of the instant sale. In these circumstances, the actions of the law enforcement agents could hardly be characterized as a violation of the Due Process Clause.

Furthermore, the trial court, over government objection, instructed the jury in accordance with the entrapment theory urged by petitioner.[2] Even under those instructions

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[2]The instruction was as follows (Tr. 550-552):

> In that connection, you are instructed that the law protects a defendant prosecuted for an offense in which the extent of the government's involvement in the criminal activity is so great and intense and aggressive that the prosecution must fail for that reason alone. And so if you find that the witness Gonzalez was acting and doing all of the things that he reported to you on the witness stand as an agent of the government and an employee of the government, then you must find the defendants not guilty.
>
> In connection with the defendants' position you are charged that an agent is one who acts in the place then of his principal, and if the principal was the Customs Service and Gonzalez was its agent, then you would have the existence of principal and agent and the agent would be acting in the position of and under the authority of and with the authority of the principal, and as I said, the law does not permit the government to so engage in criminal activity and thus convict defendants, even though the defendants are otherwise guilty of the offense.

the jury did not find entrapment, and petitioner suggests no reason for review of that factual determination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

And so if you find from the evidence that the witness Gonzalez was in fact acting under the direction of and the authority of the Customs Service, and if you find from the evidence that the government then, through its agent Gonzalez, did participate in a plan to illegally import marijuana into the United States and offer to deliver the marijuana to the defendants and actively assist in the importation and delivery of marijuana into the United States and procure and deliver the marijuana to the defendants, then you shall acquit the defendants.